Majlis Peguam Malaysia v Michael Joseph Carvalho & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-5–02 OF 2023

MOHAMAD ZABIDIN CJ (MALAYA), ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK) AND RHODZARIAH BUJANG FCJ

28 AUGUST 2023

Legal Profession — Compensation Fund — Application of moneys in fund — Whether Malaysian Bar could to compensate members of public using money from Bar Council's Compensation Fund for losses arising from acts of dishonesty by advocates and solicitors practicing in partnerships as opposed to sole proprietorships — Whether para (2)(b) of 'Guidelines on Making a Claim for Compensation' contrary to sub-ss (8) and (9) of s 80 of Legal Profession Act 1976 — Whether claimant ought to enforce restitution order against legal firm or advocate and solicitor before claiming for Compensation Fund — Guidelines on Making a Claim for Compensation para (2)(b) — Legal Profession Act 1976 s 80(2), (8), (9) & (12)

The respondents were two out of four beneficiaries of a property located in the District of Kinta, Perak ('the property'). The property was sold to a purchaser for RM2,524,410 and the said amount was paid to the vendor's solicitor known as Messrs Thevin Chandran & Associates ('Messrs Thevin'). One of the advocates and solicitors of Messrs Thevin known as Shan a/l Theivanthiran ('Shan') then issued two cheques each for the sum of RM521,427 to the respondents but the respondents did not cash the cheques as Shan told them not to do so until further notice. Shan then issued a cheque for the sum of RM1,042,854 ('the said sum') to the respondents but the said cheque was dishonored, and Shan failed to pay the said sum to the respondents. The Advocates and Solicitors Disciplinary Board ('the ASDB') found Shan guilty of professional misconduct and ordered that: (a) Shan to be struck off the Rolls of Advocates and Solicitors of the High Court; and (b) Shan to make restitution of the said sum to the respondents ('the restitution order'). The respondents then attempted to claim from the Malaysian Bar ('the appellant') for the restitution sum to be paid out of the Bar Council's Compensation Fund ('the Compensation Fund') but the appellant rejected the claim for the reason that Shan was practicing as a partner in Messrs Thevin, as such, the claim was contrary to the eligibility requirements stipulated in para (2)(b) of the 'Guidelines on Making a Claim for Compensation' ('the Guidelines'). Aggrieved by the decision, the respondents filed originating summons for the reliefs, inter alia: (i) an order of certiorari to quash the appellant's decision; (ii) an order of mandamus or otherwise that the appellant pay the restitution sum to the respondents from the Compensation Fund pursuant to the

restitution order; (iii) a declaration that para (2)(b) of the Guidelines was contrary to sub-ss (2), (8) and (9) of s 80 of the Legal Profession Act 1976 ('the LPA'); and (iv) a declaration that the appellant's refusal to pay the restitution sum to the respondents from the Compensation Fund was ultra vires and was beyond the authority of the appellant and was invalid, void and of no effect. The application was dismissed by the High Court but on appeal, the Court of Appeal found in favour of the respondents and further ordered that: (A) the respondents to resubmit their application to the Malaysian Bar within 60 days; (B) the appellant shall consider the respondents' application for compensation from the Compensation Fund; and (C) the appellant shall make the appropriate award based on the same formula for payment for the year in question ie, 2020 ('the COA's order'). Dissatisfied with the decision, the appellant filed the present appeal. The issue that arose in the present appeal concerned the power of the Malaysian Bar (the appellant) to compensate members of the public using money from the Compensation Fund for losses arising from acts of dishonesty by advocates and solicitors practicing in partnerships as opposed to sole proprietorships. In this relation, the court had to consider whether para (2)(b) of the Guidelines ultra vires sub-ss (8) and (9) of s 80 of the LPA. Aside from the said issues, there were also arguments by the appellant that: (1) the respondents ought to have first exercise the alternative remedy ie, enforcing the restitution order; and (2) the COA's order was contrary to s 80(8) of the LPA which did not prescribe a mandatory obligation on the Bar Council to make a grant out of the Compensation Fund.

Held, dismissing the appeal with costs of RM50,000 to the respondents subject to payment of the allocator fee:

(1) The court agreed with the Court of Appeal's findings that: (a) there was nothing in sub-ss (8) and (9) of s 80 of the LPA to restrict payment out of the Compensation Fund only to losses arising from the dishonesty of advocates and solicitors practicing as sole proprietors; and (b) the two subsections make no distinction between a claim for losses arising from the dishonest acts of advocates and solicitors practicing as sole proprietors and a claim for losses arising from the dishonest acts of advocates and solicitors practicing in partnerships. Further, subsection (8) of s 80 of the LPA also provided that a person who had suffered losses due to the dishonest acts of the clerk or servant of an advocate and solicitor would also be entitled to apply for a grant out of the Compensation Fund, even though, a clerk and servant was not an advocate and solicitor. Parliament would have made the distinction clear if the intention was to allow payment out of the Compensation Fund only in cases involving dishonesty by advocates and solicitors practicing as sole proprietors and not in cases involving dishonesty by advocates and solicitors practicing in partnerships (see paras 20–23).

(2) Paragraph (2)(b) of the Guidelines was clearly inconsistent with sub-ss (8) and (9) of s 80 of the LPA and was therefore null and void and of no effect. Being a 'subsidiary' provision, it could not override the two principal provisions, ie, sub-ss (8) and (9) of s 80 of the LPA which did not restrict applications for grants out of the Compensation Fund only to losses arising from the dishonest acts of advocates and solicitors practicing as sole proprietors. There was nothing in s 80(12) of the LPA that empowered the Bar Council to impose conditions such as the condition imposed by para (2)(b) of the Guidelines. As rightly held by the Court of Appeal, it only empowered the Bar Council to make rules in respect of the procedure for making a claim out of the Compensation Fund but not on matters of the substantive rights of the parties (see paras 25–26, 44 & 48).

(3) The court was of the view that a guideline that took away a person's substantive right under s 80(8) of the LPA in the name of protecting the Compensation Fund from depletion was unlawful and was liable to be struck down. The power of the Bar Council to make rules or guidelines in respect of the procedure to be followed in protecting the Compensation Fund from depletion did not extend to extinguishing the statutory right given to a person by s 80(8) of the LPA to apply for a grant out of the Compensation Fund for losses due to the dishonest acts of advocates and solicitors practicing in partnerships (see para 30).

(4) It was for the respondents to decide on the course of action that would best serve their interests. They must have their own reasons for not pursuing the other alternatives open to them against the dishonest advocate and solicitor whose partnership firm had ceased operations and was no longer in existence. Further, there was no statutory requirement for the respondents to first exercise their alternative remedies of enforcing the restitution orders or to sue the dishonest advocate and solicitor for their losses before they were entitled to apply for a grant out of the Compensation Fund (see paras 55 & 58).

(5) The court found nothing objectionable about the COA's order. It merely directed the appellant to consider the application when made by respondents using the same formula for payment for the year, which was the year 2020. That was fair considering that 2020 was the year when the respondents' application was made and rejected by the appellant (see para 63).

[Bahasa Malaysia summary

Responden-responden adalah dua daripada empat benefisiari bagi hartanah yang terletak di Daerah Kinta, Perak ('hartanah tersebut'). Hartanah tersebut telah dijual kepada pembeli pada harga RM2,524,410 dan jumlah tersebut telah dibayar kepada peguam cara vendor yang dikenali sebagai Tetuan Thevin

Chandran & Associates ('Tetuan Thevin'). Salah seorang peguam bela dan peguam cara Tetuan Thevin yang dikenali sebagai Shan a/l Theivanthiran ('Shan') kemudian mengeluarkan dua keping cek setiap satu berjumlah RM521,427 kepada responden-responden tetapi mereka tidak menunaikan cek tersebut kerana Shan memberitahu mereka supaya tidak berbuat demikian sehingga diberitahu kelak. Shan kemudian mengeluarkan cek untuk jumlah RM1,042,854 ('jumlah tersebut') kepada responden-responden tetapi cek tersebut adalah cek tendang, dan Shan gagal membayar jumlah tersebut kepada responden-responden. Lembaga Tatatertib Peguambela dan Peguamcara ('ASDB') mendapati Shan bersalah atas salah laku profesional dan memerintahkan bahawa: (a) Shan digugurkan daripada Daftar Peguambela dan Peguamcara Mahkamah Tinggi; dan (b) Shan untuk membuat pengembalian jumlah tersebut kepada responden-responden ('perintah pengembalian'). Responden-responden kemudian cuba menuntut daripada Majlis Peguam Malaysia ('perayu') untuk jumlah pengembalian tersebut supaya dibayar daripada Kumpulan Wang Pampasan Majlis Peguam ('Kumpulan Wang Pampasan') tetapi perayu menolak tuntutan tersebut atas alasan Shan mengamalkan amalan sebagai rakan kongsi dalam Tetuan Thevin, oleh itu, tuntutan tersebut bertentangan dengan syarat kelayakan yang ditetapkan dalam perenggan (2)(b) 'Garis Panduan untuk Membuat Tuntutan Pampasan' ('Garis Panduan tersebut'). Terkilan dengan keputusan tersebut, responden-responden memfailkan saman pemula untuk relif-relif, antara lain: (i) perintah certiorari untuk membatalkan keputusan perayu; (ii) perintah mandamus atau selainnya bahawa perayu membayar jumlah pengembalian tersebut kepada responden-responden daripada Kumpulan Wang Pampasan menurut perintah pengembalian tersebut; (iii) pengisytiharan bahawa perenggan (2)(b) Garis Panduan tersebut adalah bertentangan dengan sub-ss (2), (8) dan (9) s 80 Akta Profesion Undang-undang 1976 ('APUU'); dan (iv) pengisytiharan bahawa keengganan perayu untuk membayar jumlah pengembalian tersebut kepada responden-responden daripada Kumpulan Wang Pampasan adalah ultra vires dan di luar kuasa perayu dan adalah tidak sah, terbatal dan tidak memberi apa-apa kesan. Permohonan tersebut telah ditolak oleh Mahkamah Tinggi tetapi atas rayuan, Mahkamah Rayuan membuat keputusan yang memihak kepada responden-responden dan seterusnya memerintahkan agar: (A) responden-responden mengemukakan semula permohonan mereka kepada Majlis Peguam Malaysia dalam tempoh 60 hari; (B) perayu hendaklah mempertimbangkan permohonan responden-responden untuk mendapatkan pampasan daripada Kumpulan Wang Pampasan; dan (C) perayu hendaklah membuat award yang sesuai berdasarkan formula yang sama untuk pembayaran bagi tahun berkenaan iaitu, 2020 ('perintah MR'). Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu yang timbul dalam rayuan semasa adalah berkaitan kuasa Majlis Peguam Malaysia (perayu) untuk membayar pampasan kepada orang ramai menggunakan wang daripada Kumpulan Wang Pampasan bagi kerugian yang timbul daripada perbuatan tidak jujur oleh

peguam bela dan peguam cara yang mengamalkan perkongsian berbanding pemilikan tunggal. Berhubung dengan ini, mahkamah perlu mempertimbangkan sama ada perenggan (2)(b) Garis Panduan tersebut ultra vires sub-ss (8) dan (9) s 80 APUU. Selain daripada isu-isu tersebut, terdapat juga hujah-hujah oleh perayu bahawa: (1) responden-responden sepatutnya terlebih dahulu menggunakan remedi alternatif iaitu, menguatkuasakan perintah pengembalian tersebut; dan (2) perintah MR tersebut adalah bertentangan dengan s 80(8) APUU yang tidak menetapkan kewajipan mandatori ke atas Majlis Peguam untuk membuat bayaran daripada Kumpulan Wang Pampasan.

Diputuskan, menolak rayuan dengan kos sebanyak RM50,000 kepada responden-responden tertakluk kepada bayaran fi alokator:

(1) Mahkamah bersetuju dengan dapatan-dapatan Mahkamah Rayuan bahawa: (a) tiada apa-apa dalam sub-ss (8) dan (9) s 80 APUU yang mengehadkan pembayaran daripada Kumpulan Wang Pampasan hanya kepada kerugian yang timbul daripada ketidakjujuran peguam bela dan peguam cara yang menjalankan amalan sebagai pemilik tunggal; dan (b) kedua-dua subseksyen tersebut tidak membezakan antara tuntutan bagi kerugian yang timbul daripada perbuatan tidak jujur peguam bela dan peguam cara yang menjalankan amalan sebagai pemilik tunggal dan tuntutan bagi kerugian yang timbul daripada perbuatan tidak jujur peguam bela dan peguam cara yang menjalankan amalan secara perkongsian. Selanjutnya, sub-ss (8) s 80 APUU juga memperuntukkan bahawa seseorang yang telah mengalami kerugian akibat perbuatan tidak jujur kerani atau perkhidmat peguam bela dan peguam cara juga berhak untuk memohon tuntutan daripada Kumpulan Wang Pampasan, walaupun seorang kerani dan perkhidmat bukanlah seorang peguam bela dan peguam cara. Parlimen akan menjelaskan perbezaannya jika niatnya adalah untuk membenarkan pembayaran daripada Kumpulan Wang Pampasan hanya dalam kes yang melibatkan ketidakjujuran oleh peguam bela dan peguam cara yang menjalankan amalan sebagai pemilik tunggal dan bukan dalam kes yang melibatkan ketidakjujuran oleh peguam bela dan peguam cara yang mengamalkan perkongsian (lihat perenggan 20–23).

(2) Perenggan (2)(b) Garis Panduan tersebut jelas tidak konsisten dengan sub-ss (8) dan (9) s 80 APUU dan oleh itu adalah batal dan tidak sah dan tidak berkuat kuasa. Sebagai peruntukan 'subsidiari', ia tidak boleh mengatasi dua peruntukan utama, iaitu sub-ss (8) dan (9) s 80 APUU yang tidak mengehadkan permohonan untuk pemberian daripada Kumpulan Wang Pampasan hanya kepada kerugian yang timbul daripada tindakan tidak jujur peguam bela dan peguam cara yang beramal sebagai pemilik tunggal. Tiada apa-apa dalam s 80(12) APUU yang memberi kuasa kepada Majlis Peguam untuk mengenakan syarat

seperti syarat yang dikenakan oleh perenggan (2)(b) Garis Panduan tersebut. Seperti yang diputuskan dengan betul oleh Mahkamah Rayuan, ia hanya memberi kuasa kepada Majlis Peguam untuk membuat peraturan berkenaan dengan prosedur untuk membuat tuntutan daripada Kumpulan Wang Pampasan tetapi bukan mengenai perkara hak substantif pihak-pihak (lihat perenggan 25–26, 44 & 48).

(3) Mahkamah berpendapat bahawa sesuatu garis panduan yang menghilangkan hak substantif seseorang di bawah s 80(8) APUU atas nama melindungi Kumpulan Wang Pampasan daripada kehabisan adalah menyalahi undang-undang dan boleh dibatalkan. Kuasa Majlis Peguam untuk membuat peraturan atau garis panduan berkenaan dengan prosedur yang perlu dipatuhi dalam melindungi Kumpulan Wang Pampasan daripada kehabisan tidak meliputi kepada memadamkan hak statutori yang diberikan kepada seseorang oleh s 80(8) APUU untuk memohon bayaran daripada Kumpulan Wang Pampasan untuk kerugian akibat perbuatan tidak jujur peguambela dan peguam cara yang menjalankan amalannya melalui perkongsian (lihat perenggan 30).

(4) Terpulang kepada responden-responden untuk memutuskan tindakan yang paling sesuai untuk kepentingan mereka. Mereka mesti mempunyai alasan sendiri untuk tidak meneruskan alternatif lain yang terbuka kepada mereka terhadap peguam bela dan peguam cara yang tidak jujur yang firma perkongsiannya telah berhenti beroperasi dan tidak lagi wujud. Selanjutnya, tiada keperluan berkanun bagi responden-responden untuk terlebih dahulu menggunakan remedi alternatif mereka untuk menguatkuasakan perintah pengembalian atau menyaman peguam bela dan peguam cara yang tidak jujur atas kerugian mereka sebelum mereka berhak untuk memohon bayaran daripada Kumpulan Wang Pampasan (lihat perenggan 55 & 58).

(5) Mahkamah mendapati tiada apa-apa yang boleh dipertikaikan tentang perintah MR tersebut. Ia hanya mengarahkan perayu mempertimbangkan permohonan apabila dibuat oleh responden-responden menggunakan formula yang sama untuk pembayaran bagi tahun tersebut, iaitu tahun 2020. Itu adalah adil memandangkan tahun 2020 adalah tahun permohonan responden-responden dibuat dan ditolak oleh perayu (lihat perenggan 63).]

Cases referred to

Ahmed & Co (a firm) and others, Re [2006] All ER (D) 195 (Mar), Ch D (refd)
Agathisfour Sdn Bhd v Papparich Group Sdn Bhd [2021] 8 MLJ 710, HC (refd)
Borg-Warner Acceptance Canada Ltd v Law Society of New Brunswick [1988] NBJ 205, QBD (refd)

A *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640, FC (refd)
El-Hennawy v Law Society of Upper Canada [2014] OJ No 395, SC (refd)
Green v Law Society of Manitoba [2017] SCC 20, SC (refd)
Law Society of British Columbia v Trinity Western University and another (Lawyers' Rights Watch Canada and others intervening) [2018] 2 SCR 293, SC
B (refd)
Leong Sing (sued as a firm) v Perusahaan Kuari (Melaka Pindah) Sdn Bhd (formerly known as Malacca Lian Hwa Sdn Bhd) [1997] 5 MLJ 657, HC (refd)
Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41 (distd)
C *Party A v Law Society of British Columbia* [2021] BCJ No 600, CA (refd)
R v Law Society, ex parte Nielsen [1998] Lexis Citation 1438, QBD (distd)
R v Law Society, ex parte Mortgage Express Ltd; R v Law Society, ex parte Alliance and Leicester Building Society [1997] 2 All ER 348, CA (distd)
D *R v Law Society, ex parte Reigate Projects Ltd and others* [1992] 3 All ER 232, QBD (distd)

Legislation referred to

Advocates and Solicitors Compensation Fund Rules 1978
E Legal Profession Act 1976 ss 3, 80, 80(1), (2), (8), (9), (12), 100(8), (10)
Native Courts Ordinance (Cap 43) ss 7(3), 8(1)(c)
Partnership Act 1961 ss 7, 11, 12, 14
Solicitors Act 1974 [UK] s 36(2)(a)

F

Appeal from: *Michael Joseph Carvalho & Anor v Majlis Peguam Malaysia* [2023] 1 MLJ 139 (Court of Appeal, Putrajaya))

Gregory Das (with Jeremiah Rais and Leah Samuel) (Steven Thiru & Sudhar Partnership) for the appellant.
G *Subashini Gunasegaran (with Baljeet Kaur) (VT Singam, D Gunasegaran & Co) for the respondents.*

Abdul Rahman Sebli CJ (Sabah and Sarawak) (delivering judgment of the
H **court):**

[1] The issues that arise in this appeal concern the power of the Malaysian Bar (the appellant) to compensate members of the public using money from the Bar Council's Compensation Fund for losses arising from acts of dishonesty
I by advocates and solicitors practicing in partnerships (as opposed to sole proprietorships).

[2] The facts as narrated by the appellant are undisputed and they are as follows, with the necessary modifications. The respondents lodged a complaint

with the Advocates and Solicitors' Disciplinary Board ('the ASDB'). The complaint was as follows:

(a) the respondents were two out of four beneficiaries of a property held under PN No Hakmilik Lot 4091, Mukim Hulu Kinta, Daerah Kinta, Perak Darul Ridzuan ('the property');

(b) the respondents consented to the sale and transfer of the property to Kawan Properties Sdn Bhd ('the purchaser'). The respondents' sister, one Cecelia a/p Bernado Carvalho ('the vendor'), executed a sale and purchase agreement dated 12 July 2011 to sell the property to the purchaser for the sum of RM2,524,410;

(c) one Shan a/l Theivanthiran ('Shan') practicing as a partner of Messrs Thevin Chandran & Associates acted as solicitors for the vendor;

(d) the purchaser's solicitors issued a cheque for the sum of RM2,145,748.50 ('the balance purchase price') to the vendor's solicitors Messrs Thevin Chandran & Associates;

(e) the balance purchase price was intended to be divided equally between the respondents being the two other beneficiaries of the property;

(f) Shan then issued two cheques, each for the sum of RM521,427 to the respondents;

(g) however, the respondents did not cash the cheques as Shan told them not to do so until further notice;

(h) Shan subsequently issued and banked in a cheque for the sum of RM1,042,854. This sum was intended to be divided between the respondents. The cheque was dishonoured; and

(i) Shan failed to make payment of the sum of RM1,042,854 to the respondents despite making assurances to do so.

[3] After a due inquiry, the ASDB affirmed the Disciplinary Committee's finding of liability and recommendation on punishment against Shan and found him guilty of professional misconduct.

[4] By way of an order dated 18 July 2020, the ASDB ordered Shan to be struck off the Rolls of Advocates and Solicitors of the High Court of Malaya within 21 days from the date of the ASDB order ('the ASDB order'). The ASDB further ordered that:

(a) Shan make a restitution in the sum of RM521,427 to the first respondent within one month of the ASDB order; and

A (b) Shan make a restitution in the sum of RM521,427 to the second respondent within one month of the ASDB order (collectively 'the restitution sum').

B **[5]** By email dated 21 September 2020 addressed to the appellant, the respondents' solicitors wrote to enquire if the respondents were entitled to claim the restitution sum from the Compensation Fund. There was no mention made of the steps taken by the respondents to recover the sum under the restitution order.

C **[6]** On 22 September 2020, the appellant issued an email informing the respondents' solicitors that it was unable to entertain any claim for the restitution sum to be paid out of the Compensation Fund as Shan was practicing as a partner in Messrs Thevin Chandran & Associates.

D **[7]** The reason given by the appellant for not entertaining the respondents' claim for the restitution sum to be paid out of the Compensation Fund was that it was contrary to the eligibility requirements stipulated in the Guidelines on Making A Claim for Compensation ('the Guidelines').

E **[8]** Dissatisfied with the decision of the appellant, the respondents by way of an originating summons, filed an action against the appellant in the High Court for the following reliefs, amongst others:

F (a) an order of certiorari to quash or set aside the appellant's decision;

(b) an order of mandamus or otherwise that the appellant pay the restitution sum to the respondents from the Compensation Fund pursuant to the ASDB order;

G (c) a declaration that para (2)(b) of the Guidelines is contrary to sub-s (2), (8) and (9) of s 80 of the Legal Profession Act 1976 ('the LPA'); and

(d) a declaration that the appellant's refusal to pay the restitution sum to the respondents from the Compensation Fund is ultra vires and is beyond the authority of the appellant and is invalid, void and of no effect.

H **[9]** On 19 August 2021, the High Court dismissed the respondents' originating summons. Aggrieved by the decision, the respondents appealed to the Court of Appeal. Their appeal was allowed and the following orders were made against the appellant:

I (a) a declaration that para (2)(b) of the Guidelines is ultra vires sub-s (2), (8) and (9) of s 80 of the LPA;

(b) a declaration that the appellant's refusal to consider payment out of the Compensation Fund to the respondents to mitigate their loss suffered as

a result of the dishonest act of Shan, an advocate and solicitor, is unreasonable and irrational and is ultra vires and/or in excess of the statutory powers of the appellant under the LPA and is therefore null and void and of no effect;

(c) that the respondents in accordance with the procedure in the Advocates and Solicitors Compensation Fund Rules 1978 ('the CFR') resubmit an application to the Malaysian Bar within 60 days from 15 August 2022 and the appellant shall consider the respondents' application for compensation for their loss suffered and shall make an appropriate award of compensation from the Compensation Fund using the same formula for payment for the year in question, which is the year 2020;

(d) costs of RM10,000 to the respondents subject to payment of the allocator fee; and

(e) parties are at liberty to apply to the High Court.

[10] Having heard arguments by the parties on 12 April 2023 both written and oral, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[11] In dismissing the respondents' originating summons, the High Court held that the Guidelines were valid and that the respondents 'telah tidak mematuhi kriteria seperti terdapat di dalam Garis Panduan Tuntutan Pampasan yang dikeluarkan mengikut seksyen 80(12) Akta Profesyen Undang-Undang 1976'.

[12] The *Garis Panduan Tuntutan Pampasan* that the High Court upheld to be valid is para (2)(b) of the Guidelines which is couched in the following language:

(2) Eligibility and Procedure

Any person who has sustained losses owing to the dishonesty of lawyers may apply for a grant out of the Compensation Fund under these circumstances:

(a) ...;

(b) The lawyer concerned was practicing as a sole proprietor at the material time of the breach;

(c) ...

[13] It is interesting to note that para (2)(b) of the Guidelines uses the words 'lawyers' and 'lawyer' in that order instead of the words 'advocate and solicitor' used in s 80 of the LPA. For consistency we shall in this judgment use the words 'advocate and solicitor' or 'advocates and solicitors' as the case may be.

[14] The Guidelines were made by the Bar Council pursuant to the CFR which in turn was made under s 80(12) of the LPA which reads:

> (12) The Bar Council may make rules in respect of the procedure to be followed in giving effect to this section and in respect of any matters incidental, ancillary or supplemental thereto or concerning the administration or protection of the Fund.

[15] Of relevance to note is that there is nothing in the CFR which states or even suggests that an application for a grant out of the Compensation Fund is restricted to losses caused by dishonest advocates and solicitors who practice as sole proprietors and not to losses caused by dishonest advocates and solicitors who practice as partners in a partnership. The terms of the CFR, made pursuant to s 80(12), are as follows:

> In the exercise of the powers conferred by subsection (12) of section 80 of the Legal Profession Act 1976 [Act 166], the Bar Council makes the following rules:
>
> 1 Citation
>
> These Rules may be cited as the Advocates and Solicitors' Compensation Fund Rules 1978.
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> 2 Contribution to be paid annually in advance
>
> Contribution to the Compensation Fund for the succeeding year shall be paid annually in advance by each advocate and solicitor on application by him for a Sijil Annual.
>
> 3 Notice on Form A
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> Before or at the time of making an application to the Bar Council for a grant out of the Compensation Fund, an applicant shall complete, sign and deliver to the Secretary of the bar Council a notice in Form A set out in the Schedule or in a form to the like effect approved by the Bar Council.
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> 4 Notice to be delivered to Secretary
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> Every such notice shall be delivered to the Secretary of the Bar Council within six months (or such other period not exceeding two years as the Bar Council may allow) after the loss in respect of which the notice is delivered, first come to the knowledge of the applicant.
>
> 5 Notice to accompany an application
>
> Every such notice shall be accompanied by an application for a grant out of the Compensation Fund, except where it is impracticable to deliver the application with the notice, in which case the application shall be delivered to the Secretary of the bar Council as soon as practicable after the delivery of the notice.
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> 6 Application in Form B
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> Every application shall be made in Form B set out in the Schedule or in a form to the like effect approved by the Bar Council. The Bar Council may require an applicant to make a statutory declaration in support of the application.

7 Bar Council may require oral evidence of documents

The Bar Council may require an application to be supported by oral evidence to be tendered and documents to be produced to the Bar Council or any Committee appointed and authorized by the Bar Council to exercise or to assist the Bar Council in the exercise of its functions under section 80 of the Act.

8 Bar Council may require pursuit of civil remedy or criminal proceeding The Bar Council may before deciding whether or not to make a grant out of the Compensation Fund require, in respect of any application, the pursuit of any civil remedy which may be available in respect of the loss, or the institution of criminal proceedings in respect of the dishonesty leading to the loss, or the making of an application to a Disciplinary Committee.

Every such notice shall be accompanied by an application for a grant out of the Compensation Fund, except where it is impracticable to deliver the application with the notice, in which case the application shall be delivered to the Secretary of the bar Council as soon as practicable after the delivery of the notice.

6 Application in Form B

Every application shall be made in Form B set out in the Schedule or in a form to the like effect approved by the Bar Council. The Bar Council may require an applicant to make a statutory declaration in support of the application.

7 Bar Council may require oral evidence of documents

The bar Council may require an application to be supported by oral evidence to be tendered and documents to be produced to the Bar Council or any Committee appointed and authorized by the bar Council to exercise or to assist the Bar Council in the exercise of its functions under section 80 of the Act.

8 Bar Council may require pursuit of civil remedy or criminal proceeding The Bar Council may before deciding whether or not to make a grant out of the Compensation Fund require, in respect of any application, the pursuit of any civil remedy which may be available in respect of the loss, or the institution of criminal proceedings in respect of the dishonesty leading to the loss, or the making of an application to a Disciplinary Committee.

9 Waiver

The bar Council may waive any of the provisions of these Rules or permit the amendment of any notice or application.

10 Requirement of Bar Council to be communicated by notice

Any requirement of the Bar Council under these Rules may be communicated by a notice in writing which may be delivered personally or sent by post to the addressee at his last known address. Any such notice sent by post shall be deemed to have been received by the addressee within forty-eight hours (excluding Sundays and Public Holidays) of the time of posting.

[16] According to learned counsel for the appellant, the rationale for

restricting payment of the grants only to claims involving dishonest advocates and solicitors practicing as sole proprietors is fivefold, namely:

(a) monies in the Compensation Fund are contributed by members of the appellant themselves who pay an annual subscription under s 80(1) of the LPA

(b) the Bar Council does not restrict the number of claims that can be made in a year by persons aggrieved by the dishonest acts of an advocate and solicitor;

(c) given that there is a finite or limited amount of money in the Compensation Fund at any given time, it is of practical necessity that some limits be imposed on who are eligible to receive payouts from the Compensation Fund;

(d) claims involving partnerships are excluded because losses incurred from the dishonest acts of a partner of a law firm would entitle an aggrieved party to seek recourse by way of a civil suit against the partnership, which in turn would be insured under the appellant's Professional Indemnity Insurance Scheme; and

(e) this recourse is however not available against sole proprietors as the appellant's Professional Indemnity Insurance Scheme excludes the indemnification of an insured person who is the defrauder, ie the defrauder himself.

[17] For context and to provide a clearer picture of the issues involved, it is necessary to reproduce s 80 of the LPA in its entirety:

> 80 Compensation Fund
>
> (1) The Malaysian Bar shall maintain and administer in accordance with this section a fund to be known as the 'Compensation Fund'.
>
> (2) Every advocate and solicitor shall on each occasion he applies for a Sijil Annual pay to the Malaysian Bar a contribution of such sum as the Bar Council may from time to time determine and the Malaysian Bar shall pay that contribution into the Fund:
>
> Provided that an advocate and solicitor who applies for a Sijil Annual shall be required to pay only half the contribution so determined if the practicing certificate for which he proposes to apply is valid for less than six months.
>
> (3) The Malaysian Bar may invest any moneys out of the Fund which are not immediately required for any other purposes and, for the purposes of this section, the Malaysian Bar shall have all the powers of trustees under any written law.
>
> The Malaysian Bar for the purposes of the Fund borrow from any lender and may charge any investments of the Fund by way of security for such loan.
>
> (4A) The Bar Council may, for such of the purposes of the Malaysian Bar as the Bar

Council deems fit, borrow moneys from the Fund and shall, in respect of any money so borrowed, pay to the Fund interest at the prime rate laid down by the Association of Banks in Malaysia, prevailing from time to time.

(5) The Malaysian Bar may insure the Fund with any registered insurance business in Malaysia for any purpose and on any terms as the Malaysian Bar may consider expedient.

(6) There shall be carried to the credit of the Fund —

(a) all annual contributions paid to the Malaysian Bar in pursuance of subsection (2);

(b) all interests, dividends and other income or accretions of capital arising from the investments of the Fund;

(c) the proceeds of any realization of any investments of the Fund;

(d) all moneys borrowed for the purposes of the Fund;

(e) all sums received by the Malaysian Bar under any insurance effected by the Malaysian Bar under subsection (5); and

(f) any other moneys which may belong or accrue to the Fund or be received by the Bar Council in respect of the Fund.

(7) All moneys from time to time forming part of the Fund and all investments of the Fund shall be applicable —

(a) for payment of any costs, charges and expenses of establishing, maintaining and administering the fund;

(b) for payment of any costs, charges and expenses of the Bar Council in ascertaining whether the rules made under section 78 have been complied with, pursuant to the powers given by such rules;

(c) for payment of any premiums on insurance effected by the Malaysian Bar under subsection (5);

(d) for payment of moneys borrowed by the Malaysian Bar and for payment of interest on any moneys so borrowed;

(e) for payment of any grants which the Malaysian Bar may make under subsection (8); and

(f) for payment of any other sums payable out of the Fund by virtue of this section.

(8) Where it is proved to the satisfaction of the Bar Council that any person has sustained loss in consequence of dishonesty on the part of any advocate and solicitor or any clerk or servant of an advocate and solicitor in connection with that advocate and solicitor's practice in Malaysia as an advocate and solicitor, or in connection with any trust of which that advocate and solicitor is a trustee, then subject to this section, the Malaysian Bar may, if the Bar Council thinks fair and reasonable, make a grant to that person out of the Fund for the purpose of relieving or mitigating that loss.

A (8A) If in any year there has been neither an application made for a grant from the Fund nor a grant made from the Fund, the Bar Council may in its discretion transfer from the Fund all interests, dividends and other accretions of capital arising from the Fund, or any part thereof, to a Fund of the Malaysian bar established for the purposes of purchasing or maintaining a library for the use of the members of the B Malaysian Bar and to fund established for the purpose of providing legal aid.

(9) A grant may be made under this section whether or not the advocate and solicitor had a valid practicing certificate when the act of dishonesty was committed, and notwithstanding that subsequent to the commission of the act the advocate and solicitor has died or had his name removed from or struck off the Roll or has ceased C to practice or been suspended from practice.

(10) On any grant made by the Malaysian Bar under this section to any person in respect of any loss —

(a) the Malaysian Bar shall to the extent of the grant be subrogated to all such D rights and remedies as the person to whom the grant is made may have against the advocate and solicitor, clerk or servant in respect of the loss;

(b) the person to whom the grant is made shall have no right by way of bankruptcy or other legal proceedings or otherwise to receive any sum out of the assets of the advocate or solicitor, clerk or servant in respect of the E loss until the Fund has been reimbursed with the full amount of the grant.

(11) Reference in paragraphs (10)(a) and (b) to the person to whom the grant is or to the advocate and solicitor, clerk or servant shall include, in the event of his death, insolvency or other disability, reference to his personal representatives or any other F person having authority to administer his estate.

(12) The Bar Council may make rules in respect of the procedure to be followed in giving effect to this section and in respect of any matters incidental, ancillary or supplemental thereto or concerning the administration or protection of the Fund.

G (13) The income derived from the Compensation Fund shall be exempted from income or all other taxes, and the Fund shall be an institution approved for the purposes of section 45 of the Income Tax Act 1967 [Act 53] payments to which shall be good deductions for income tax purposes in arriving at the aggregate income of the person making the payment for the relevant year.

H **[18]** The words 'Compensation Fund' and 'the Fund' referred to in the above s 80 are given the following meaning by s 3 of the LPA:

'Compensation Fund' and 'the Fund' mean the fund maintained and administered in accordance with section 80.

I **[19]** The duty of the appellant to maintain and administer the Compensation Fund is stipulated by sub-s (1). Subsection (8) provides that the Malaysian Bar 'may' make a grant out of the Compensation Fund 'if the Bar Council thinks fair and reasonable'. It is a discretion vested in the appellant

'subject to this section'. A discretion by its very nature is to be exercised and not avoided. A

[20] In reversing the decision of the High Court, the Court of Appeal found that there is nothing in sub-ss (8) and (9) of s 80 to restrict payment out of the Compensation Fund only to losses arising from the dishonesty of advocates and solicitors practicing as sole proprietors. It further found that the two subsections make no distinction between a claim for losses arising from the dishonest acts of advocates and solicitors practicing as sole proprietors and a claim for losses arising from the dishonest acts of advocates and solicitors practicing in partnerships. B C

[21] In our view, the Court of Appeal was right in making those findings as sub-ss (8) and (9) of s 80 speak of 'any advocate and solicitor', 'an advocate and solicitor', 'the advocate and solicitor' and 'that advocate and solicitor' and make no distinction between an advocate and solicitor who practices as a sole proprietor and an advocate and solicitor who practices in a partnership. Parliament would have made the distinction clear if the intention was to allow payment out of the Compensation Fund only in cases involving dishonesty by advocates and solicitors practicing as sole proprietors and not in cases involving dishonesty by advocates and solicitors practicing in partnerships. D E

[22] The Court of Appeal also pointed out that from the wordings of sub-ss (8) and (9), they cover losses from acts of dishonesty not only of advocates and solicitors who have valid practicing certificates but also of those who did not have valid practicing certificates at the time of the commission of the dishonest acts, and more importantly sub-s (8) covers, within its ambit, even acts of dishonesty of clerks and servants of the advocates and solicitors. F

[23] A clerk or servant of an advocate and solicitor is not an advocate and solicitor, let alone an advocate and solicitor practicing as a sole proprietor or in a partnership, yet by virtue of sub-s (8) of s 80, a person who has suffered losses due to the clerk or the servant's dishonest acts would also be entitled to apply for a grant out of the Compensation Fund. From a harmonious reading of sub-ss (8) and (9), it is clear to us that the net is cast wide enough so to speak to catch every fish in the pond. G H

[24] This unveils the fallacy of the appellant's argument that grants out of the Compensation Fund are only payable for losses arising from the dishonest acts of advocates and solicitors practicing as sole proprietors and not for losses arising from the dishonest acts of advocates and solicitors practicing in partnerships. I

[25] Paragraph (2)(b) of the Guidelines is clearly inconsistent with sub-ss (8)

A and (9) of s 80 and is therefore null and void and of no effect. Being a 'subsidiary' provision it cannot override the two principal provisions, ie sub-ss (8) and (9) of s 80 which do not restrict applications for grants out of the Compensation Fund only to losses arising from the dishonest acts of advocates and solicitors practicing as sole proprietors.

B

[26] There is nothing in s 80(12) of the LPA that empowers the Bar Council to impose conditions such as the condition imposed by para (2)(b) of the Guidelines. As rightly held by the Court of Appeal, it only empowers the Bar Council to make rules in respect of the procedure for making a claim out of the Compensation Fund but not on matters of the substantive rights of the parties.

C

[27] A careful reading of s 80(12) of the LPA will reveal that the intention behind the provision is to empower the Bar Council to make rules in respect of the 'procedure' for achieving the following purposes:

D

(i) to give effect to s 80; and

(ii) in respect of any matters incidental, ancillary or supplemental thereto or concerning the administration or protection of the fund.

E

[28] To place a limit on a person's substantive right under s 80(8) of the LPA by restricting his claim only to losses arising from the dishonest acts of an advocate and solicitor practicing as a sole proprietor is not to make rules in respect of the 'procedure' for the purposes of (i) and (ii) above. It is to change the rules without legislative sanction.

F

[29] To support his argument that the Bar Council is empowered to make the Guidelines, specifically para (2)(b), learned counsel for the appellant pointed out that s 80(12) of the LPA is worded widely enough to include matters 'concerning the administration or protection of the Fund'. It was argued that the eligibility criteria of claims would also relate to the 'protection' of the Compensation Fund as it serves as a protection against undue depletion of the Fund, which would happen if unrestricted claims were to be allowed. The concern no doubt is with 'undue depletion' of the Compensation Fund.

G

H

[30] With due respect, a guideline that takes away a person's substantive right under s 80(8) of the LPA in the name of protecting the Compensation Fund from depletion is unlawful and is liable to be struck down. The power of the Bar Council to make rules or guidelines in respect of the procedure to be followed in protecting the Compensation Fund from depletion does not extend to extinguishing the statutory right given to a person by s 80(8) of the LPA to apply for a grant out of the Compensation Fund for losses due to the dishonest acts of advocates and solicitors practicing in partnerships.

I

[31] We were told that the Guidelines were made by the Bar Council 'to ensure consistency and non-arbitrariness in the processing of the claim as the person administering the Fund may change from year to year'. That may be so, but para (2)(b) of the Guidelines in its present form is manifestly arbitrary by excluding advocates and solicitors practicing in partnerships from its ambit when the truth of the matter is that monies in the Compensation Fund come from compulsory annual contributions from every practicing advocate and solicitor registered with the Malaysian Bar, irrespective of whether the advocate and solicitor is practicing as a sole proprietor, in a partnership, as a consultant or as a legal assistant.

[32] There is no reasonable ground for the appellant to deprive the respondents' claim for a grant out of the Compensation Fund as the purpose of the Fund is to protect the interest of members of the public like the respondents who, as clients of advocates and solicitors, have suffered losses due to the dishonesty of such advocates and solicitors whom they have put their trust in. That being the purpose of the Compensation Fund, does it matter if the advocate and solicitor is a sole proprietor or in a partnership? We think not.

[33] It was submitted that the Court of Appeal erred in failing to consider the object and purpose of the Guidelines. The contention was that the Bar Council is entitled under its statutory powers to restrict the payment of compensation to the public with a view to 'conserving' the funds in the Compensation Fund. This is just another way of saying that the Fund needs 'protection' from depletion arising from claims due to the dishonest acts of advocates and solicitors practicing as sole proprietors but not from claims arising from the dishonest acts of advocates and solicitors practicing in partnerships. It was argued that it is neither feasible nor practical to make the compensatory fund of a professional body to be 'open-ended' so as to entertain all claims.

[34] Our attention was drawn to the following remarks made by the Deputy Minister who moved the relevant Bill on the LPA:

> Among other purposes, the Compensation Fund may be used by the Bar Council, if it thinks fair and reasonable, to make a grant to a person who has suffered loss because of the dishonesty of his advocate and solicitor or his clerk or servant in his practice or in his capacity as a trustee in managing trust funds. Such grant may also be made where the advocate and solicitor has died or has been struck off the Roll of Advocates and Solicitors or has ceased to practice or has been suspended from practice. It is hoped that this provision will operate as a security against loss to a client as a result of the dishonest conduct of an advocate and solicitor. Any person who receives a grant under this provision cannot claim against the advocate and solicitor concerned.

[35] On the strength of the above statement by the Deputy Minister, it was submitted that the legislature intended the Bar Council to have the latitude in determining when a grant can be made out of the Compensation Fund. What is relevant to note from the above speech is that the Deputy Minister was hoping that the provision on Compensation Fund will operate as a security against loss to a client as a result of the dishonest conduct of 'an advocate and solicitor'.

[36] Nowhere did the Deputy Minister say that the Compensation Fund is only meant for losses arising from the dishonest acts of advocates and solicitors practicing as sole proprietors. What he did say is that a person who receives a grant out of the Compensation Fund cannot claim against the advocate and solicitor who committed the dishonest act. The Deputy Minister was of course speaking of the principal Act, ie the LPA and not the CFR or the Guidelines.

[37] What the speech implies to our mind is that a person who has suffered losses arising from the dishonest acts of the advocate and solicitor concerned, irrespective of whether he practices as a sole proprietor or in a partnership, and irrespective of whether he is still alive or dead or has been struck off the Roll, has the option of either to apply for a grant out of the Compensation Fund or to file a civil claim against him. But he cannot have the benefit of both. Nothing beyond that should be read into the statement.

[38] The appellant relied heavily on the principle of deference to be accorded to professional bodies governing the legal profession, which according to learned counsel is well entrenched in Canada, citing *Law Society of British Columbia v Trinity Western University and another (Lawyers' Rights Watch Canada and others intervening)* [2018] 2 SCR 293; *Green v Law Society of Manitoba* [2017] SCC 20; *Party A v Law Society of British Columbia* [2021] BCJ No 600; and *El-Hennawy v Law Society of Upper Canada* [2014] OJ No 395.

[39] The argument was that entities like the Bar Council which regulate and govern the legal profession should be accorded wide latitude in making rules in the regulation and governance of the profession.

[40] As for the appellant's contention that para (2)(b) of the Guidelines is not ultra vires sub-ss (8) and (9) of s 80 of the LPA , reliance was placed on the following authorities from the United Kingdom:

(a) the English Court of Appeal case of *R v Law Society, ex parte Mortgage Express Ltd; R v Law Society, ex parte Alliance and Leicester Building Society* [1997] 2 All ER 348, quoting the following passages in the judgment of the Lord Chief Justice:

> It seems clear to us from the current legislation, the history of the fund and the mode of operating it that the solicitors' profession was never intended or required to assume an open-ended liability to meet any unsatisfied loss sustained by any party caused by the dishonesty of any solicitor. The liability imposed (for instance) on banks and stockbrokers is very much more modest. Any discretion in a matter of this kind must, of course, be exercised reasonably, fairly, in good faith, so far as possible consistently and with regard to the objects of the legislation. But there is nothing to prevent the Law Society formulating and following policies which satisfy these criteria, provided they do not fetter their discretion by applying such policies inflexibly and without recognizing that exceptional cases may call for exceptional exercises of discretion. Administering a limited fund exposed to potentially unlimited demands, and with a membership whose resources are finite, the Law Society are in practice bound (and in law they are entitled) to give priority to those classes of claims which they regard, for sustainable reasons, as having the most pressing claim to be met (wholly or in part) out of the fund. This inevitably means that some applicants who succeed at the first stage fail at the second. That is because they do not have a right to seek a favourable exercise of discretion.

(b) the High Court of England and Wales case of *R v Law Society, ex parte Reigate Projects Ltd and others* [1992] 3 All ER 232 which found that the Law Society was entitled to adopt a limiting policy that clients of dishonest solicitors would only be compensated from the compensation fund under s 36(2)(a) of the Solicitors Act 1974 for the loss of monies entrusted to the solicitor for the client's purposes and further that compensation would not be paid for any consequential losses arising from the loss of those monies. Particular emphasis was placed by learned counsel on the following observations by the court:

> There are we were told a large number of solicitors in practice without a partner or partners. If every time one of them is dishonest compensation has to be paid on the basis of a claim for damages and consequential loss calculated upon the broadest possible construction of s 36(2), the compensation fund would need to be very much larger than it is, impossibly so if regard is had, as it must be, to the scale of contributions and levies which solicitors can reasonably be expected to bear ...
>
> ...
>
> Certain features of the present controversy are, I think, easy to identify and, on authority, capable of being stated as principles for present purposes. They are: (1) the Law Society is entitled, providing it makes known what it is and it is reasonable, to have a policy for administering the compensation fund; (2) it has a discretion to deny or to accept in whole or in part any claim made upon the compensation fund; (3) it must not unwarrantably fetter that discretion; (4) it must provide reasons for its decisions; and (5) it must consider the whole of the representations of a claimant, but it is not bound to hear him in person — see *R v Professional Purposes Committee of the Law Society, ex p Nicholson* (11 February 1988, unreported), Kennedy J. I have

already dealt with (4) but (5) does not arise for consideration.

The other principles have to be viewed in the light of a proper construction of s 36(2)(a). As to that, I am unable to accept that which was adumbrated by Mr Hamer. It is tantamount to saying that the expression 'loss in consequence of dishonesty' connotes an almost boundless area of consequences which are hardly to be circumscribed except by notions of the like of foreseeability and remoteness those two well-known tests used for determining liability to pay damages in civil actions based on negligence.

It seems to me to be unthinkable that Parliament should have intended to saddle the Law Society with maintaining a compensation fund to meet claims founded upon such a basis as that.

(c) the High Court of England and Wales case of *R v Law Society, ex parte Nielsen* [1998] Lexis Citation 1438 where the following observations were made:

There is no doubt that the Law Society has power to formulate and apply general policy guidelines provided they are not applied inflexibly and without regard to the circumstances of the particular case. In this context, Mr Pannick QC, for the respondents, referred to the decision of the Court of Appeal in *R v Law Society, ex parte Mortgage Express Limited and Others* [1997] 2 All ER 348. At p 359G the Lord Chief Justice set out the court's understanding of the relevant legislation:

Where application is made for payment out of the fund, the first stage of the inquiry is to ask (in a case such as these) whether the applicant satisfied the condition in s 36(2)(a) of the 1974 Act. Has the applicant suffered (or is likely to suffer) loss in consequence of dishonesty on the part of a solicitor? If the answer is negative the Law Society are not entitled to make a grant out of the fund to relieve that loss and would be in breach of trust if they were to do so. If the answer is affirmative, the Law Society may make a grant. That question is one of law, to be answered according to established legal principles as applied to the facts established to the satisfaction of the council.

If (as here) that question is answered affirmatively, the second stage of the inquiry begins. That involves asking: Should a grant be made? That is a question of quite a different nature. The answer is not to be found in the application of established legal principles to the facts as proved but in the exercise of discretion or judgment. So much appears from use of the word 'may', which is the language of discretion, and the word 'relieving', which is the language of mitigation.

[41] With due respect to learned counsel, none of the cases, both from Canada and the UK are relevant as the courts in those jurisdictions were not dealing with provisions that are identical or similar to para (2)(b) of the Guidelines, which restricts payment out of the Compensation Fund only to advocates and solicitors practicing as sole proprietors and not to advocates and solicitors practicing in partnerships.

[42] There is nothing in the passages from the Canadian and UK cases quoted by learned counsel to support his contention that the Bar Council has power under s 80(12) of the LPA to make such inflexible guideline as para (2)(b) of the Guidelines, which runs counter to s 80(8) and 80(9) of the LPA.

[43] In any event, in none of the cases were the courts called upon to decide on the issue of conflict between different provisions of the law with regard to payment of compensation for losses arising from the dishonest acts of practicing advocates and solicitors either as sole proprietors or as partners. If at all, the cases are relevant for the proposition that the discretion under s 80(8) of the LPA must be exercised by the appellant reasonably, fairly, in good faith, so far as possible consistently and with regard to the objects of the legislation (*ex parte Mortgage Express Ltd*). The following observation made by the learned judge of the High Court of England and Wales in *ex parte Nielsen* is pertinent:

> There is no doubt that the Law Society has power to formulate and apply general policy guidelines provided they are not applied inflexibly and without regard to the circumstances of the particular case.

[44] What para (2)(b) of the Guidelines does is to completely shut the door to the Compensation Fund to persons who have suffered losses due to the dishonest acts of advocates and solicitors practicing as partners in a partnership. That is untenable as it takes away the discretion vested in the appellant by s 80(8) of the LPA to make grants out of the Compensation Fund arising from the dishonest acts of 'any advocate and solicitor' and not just from the dishonest acts of advocates and solicitors practicing in sole proprietorships.

[45] From within our shores, learned counsel cited the decision of this court in *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640 for the proposition that the liability of a defrauding solicitor who practices in a partnership can be jointly and severally enforced against all partners of the firm by reference to ss 7, 11, 12 and 14 of the Partnership Act 1961.

[46] Likewise the case is of no assistance to the appellant as the issue is not germane to the issue before the court in the present appeal. It provides no answer to the question whether para (2)(b) of the Guidelines is ultra vires sub-ss (8) and (9) of s 80 the LPA.

[47] As can clearly be seen, there is no ambiguity in para (2)(b) of the Guidelines. It provides in clear language that monies under the Compensation Fund may be granted only to the victim of a dishonest advocate and solicitor if the advocate and solicitor was practicing as a sole proprietor and not if he was practicing in a partnership at the time he committed the dishonest act.

Contrary to the intention of Parliament under s 80(8) of the LPA, the intention of the Bar Council when formulating para (2)(b) of the Guidelines was to exclude from its purview advocates and solicitors who practice in partnerships. The stand taken by the appellant in the present appeal is a clear manifestation of that intention.

[48] Given the clarity of para (2)(b) of the Guidelines, the only question left to be answered, at the risk of repetition, is whether it is ultra vires s 80(8) of the LPA which, as alluded to earlier, allows for a grant to be paid out of the Compensation Fund even for losses due to the dishonest acts of clerks and servants of the advocates and solicitors with no distinction drawn between advocates and solicitors practicing as sole proprietors and advocates and solicitors practicing in partnerships. We have answered the question in the affirmative earlier in this judgment and we shall not dwell on it any further.

[49] It is worth recalling that one of the reasons given by the appellant for excluding claims involving advocates and solicitors practicing in a partnership is because losses incurred from the dishonest acts of a partner of a law firm would entitle an aggrieved party to seek recourse by way of a civil suit against the partnership, which would be insured under the appellant's Professional Indemnity Insurance Scheme. In that way compensation will be paid out of the insurance scheme and not from the Compensation Fund, thus saving the Fund from depletion.

[50] This recourse according to learned counsel is not available for claims against an advocate and solicitor practicing as a sole proprietor for the reason that the scheme excludes the indemnification of an insured person who is a defrauder, ie the sole proprietor himself.

[51] We must confess we fail to understand how this will save the Compensation Fund from depletion as money in the Compensation Fund is payable in any event, albeit only in cases of losses arising from the dishonest acts of advocates and solicitors practicing as sole proprietors as provided by para (2)(b) of the Guidelines. The argument would hold water if the Compensation Fund is not payable in all cases involving losses arising from the dishonest acts of advocates and solicitors, whether practicing as sole proprietors or as partners in a partnership. That of course would be contrary to s 80(8) of the LPA.

[52] It was also pointed out that the respondents in the present case had obtained orders of restitution from the Advocates and Solicitors Disciplinary Board under s 100(8) of the LPA which orders by virtue of s 100(10) are deemed to be orders of the High Court and enforceable by the complainant. Subsection (8) of s 100 reads as follows:

(8) Notwithstanding subsection (7), the Disciplinary Board may also make an order of restitution of the complainant's monies if it is established that such monies were or held by the advocate and solicitor in his professional capacity and the complainant is entitled to the return of such monies or part thereof.

[53] It was submitted that the respondents ought to have resorted to this alternative remedy first before applying for a grant out of the Compensation Fund, citing *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41 ('Manggai'). It was submitted that the restitution orders obtained by the respondents would stand as adequate alternative remedies available to them against the advocate and solicitor (Shan) for the losses that they sustained due to his dishonest act.

[54] It was further suggested, or rather advice given to the respondents that the option for them to institute civil proceedings against Messrs Thevin Chandran & Associates is still open despite the fact that the firm has ceased operations with effect from 1 January 2019, for the following reasons:

(a) the cessation of operations of Messrs Thevin Chandran & Associates does not preclude the institution of proceedings against the firm for losses at the time the firm was in operation. See the High Court case of *Leong Sing (sued as a firm) v Perusahaan Kuari (Melaka Pindah) Sdn Bhd (formerly known as Malacca Lian Hwa Sdn Bhd)* [1997] 5 MLJ 657;

(b) the cause of action accrued on 8 April 2016, which was the date of the breach by the lawyer in question. This was the date on which the lawyer issued the instruction to the bank to stop payment on the cheque that enclosed the respondents' share of the balance purchase price;

(c) as at 8 April 2016, Messrs Thevin Chandran & Associates was in operation, and it had three partners;

(d) therefore, the respondents are open to commence proceedings against the firm to recover losses that resulted from the breach in question; and

(e) Messrs Thevin Chandran & Associates and its partners (jointly and/or severally) at the time of the breach would be liable for the losses caused by the conduct of Shan whilst he was a partner at the firm.

[55] We are unable to accede to the argument. First of all, it is for the respondents to decide on the course of action that will best serve their interests. They must have their own reasons for not pursuing the other alternatives open to them against the dishonest advocate and solicitor whose partnership firm Thevin Chandran & Associates has ceased operations and is no longer in existence.

[56] As for the case of *Manggai* relied on by the appellant, we do not find the

ratio decidendi of the case to have any bearing on the issues before the court. In that case the Federal Court sitting at Kuching, Sarawak was dealing with s 8(1)(c) of the Native Courts Ordinance (Cap 43 of the Laws of Sarawak 1958). Section 7(3) of the Ordinance provides that:

> Such appeal shall be made within thirty days of the date of such decision, or within such further time and upon such terms as the court to which the appeal lies may in any particular case allow, and may be made either verbally or in writing and either personally or by proxy.

[57] The applicant did not pursue his right of appeal to the Native Court of Appeal. The High Court refused his application for a declaration, inter alia, that the Resident's native court was functus officio and without jurisdiction to hear the case by way of appeal or otherwise and that the purported judgment delivered by that court was null and void. In dismissing the appeal, the Federal Court held that the High Court was right in refusing to make the declaration as the applicant had not pursued the alternative remedy available to him of an appeal to the Native Court of Appeal.

[58] What separates the present case from *Manggai* is that unlike the applicant in that case, there is no statutory requirement for the respondents in the case before us to first exercise their alternative remedies of enforcing the restitution orders or to sue the dishonest advocate and solicitor for their losses before they were entitled to apply for a grant out of the Compensation Fund.

[59] The last major issue raised by the appellant that merits consideration is its contention that the Court of Appeal erred in making the order that the Bar Council shall make an appropriate award of compensation from the Compensation Fund using the same formula for payment for the year in question, which is the year 2020.

[60] It was submitted that this order would be contrary to s 80(8) of the LPA which does not prescribe a mandatory obligation on the Bar Council to make a grant out of the Compensation Fund, citing *Agathisfour Sdn Bhd v Papparich Group Sdn Bhd* [2021] 8 MLJ 710; *Borg-Warner Acceptance Canada Ltd v Law Society of New Brunswick* [1988] NBJ 205; *Re Ahmed & Co (a firm) and others* [2006] All ER (D) 195 (Mar).

[61] In the circumstances, it was argued that the Court of Appeal order ought to be set aside. The order complained of is in the following terms:

> that the appellants in accordance with the procedure in The Advocates and Solicitors Compensation Fund Rules 1978 ('the CFR') resubmit an application to the Malaysian Bar within 60 days from 15 August 2022 and the Malaysian Bar shall consider the respondents' application for compensation for their loss suffered and

shall make an appropriate award of compensation from the Compensation Fund using the same formula for payment for the year in question, which is the year 2020.

[62] Obviously there are three parts to the order, namely:

(a) the respondents are to resubmit their application to the Malaysian Bar within 60 days;

(b) the appellant shall consider the respondents' application for compensation from the Compensation Fund; and

(c) having considered the application, the appellant shall make the appropriate award based on the same formula for payment for the year in question, which is the year 2020.

[63] With due respect to learned counsel, we find nothing of substance to the complaint raised. There is nothing objectionable about this order. It merely directs the appellant to consider the application when made by respondents using the same formula for payment for the year, which is the year 2020. That is fair considering that 2020 was the year when the respondents' application was made and rejected by the appellant.

[64] For all the reasons aforesaid, our answers to the questions posed are as follows:

Questions 1, 3, and 7 — Affirmative so long as they are in conformity with the provisions of s 80(8) and (9) of the LPA, which in this case they are not. In that sense the questions are academic but answers are needed due to their public importance.

Questions 2, 4, 5, and 6 — Negative.

Question 8 — No answer needed as there was no such order issued by the Court of Appeal.

[65] Accordingly the appeal is dismissed with costs of RM50,000 to the respondents subject to payment of the allocator fee.

Appeal dismissed with costs of RM50,000 to respondents subject to payment of allocator fee.

Reported by Dzulqarnain Ab Fatar